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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

NATIONAL URBAN LEAGUE, et al.,

Plaintiffs,

v.

WILBUR L. ROSS, JR., et al.,

Defendants.

CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' PRIVILEGE
 OBJECTIONS**

Date: TBD
 Time: TBD
 Place: Courtroom 8
 Judge: Hon. Lucy H. Koh

Pursuant to the Court's October 5, 2020 Order on Procedures for In Camera Review of Documents on October 4 Privilege Log (ECF No. 299), Plaintiffs submit the following objections to Defendants' assertions of privilege in their October 4 privilege log (ECF No. 295-2). To avoid duplication, Plaintiffs incorporate their prior filings describing the scope of the deliberative process privilege and attorney-client privilege. (ECF Nos. 149 & 170).

Defendants' declaration does not attempt to support their privilege assertions, and their privilege log falls woefully short of the information required to assess or uphold their assertions of privilege.

First, Defendants redact twelve documents based on the deliberative process privilege, and withhold three documents in their entirety. As this Court and the parties have explained, "the following requirements must be met by the party asserting the privilege: '(1) a formal claim of privilege by the head of the department possessing control over the requested information, (2) an assertion of the privilege based on actual personal consideration by that official, and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation of why it properly falls within the scope of the privilege.'" First Order After In Camera Review As To Deliberative Process Privilege Asserted by Defendants (ECF No. 179) ("First Order") (quoting *Coleman v. Schwarzenegger*, Case No. 01-cv-1351, 2008 WL 2237046, at *4 (N.D. Cal., E.D. Cal. May 29, 2008)). The only declaration provided by Defendants merely notes the number of documents appearing on the privilege log. ECF No. 295-3 at ¶ 7. There is no formal claim of privilege by the relevant agency employee, much less an assertion of privilege based on that employee's personal consideration. Nor does the privilege log provide the required detailed specification of the information withheld or explanation for the basis for doing so. For example, discussions regarding field responses, draft testimony and public statements would not typically involve recommendations or advice about the adoption of an agency's policy or decision. First Order at 4 (citing *FTC v. Warner Commc 'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

Defendants withhold three documents in full, dated September 11 and 13. As an initial matter, this Court has already ruled that anything after July 29, 2020 was mere implementation

1 of the Secretary of Commerce’s decision and thus does not fall within the scope of the privilege.
 2 First Order at 6. Moreover, these documents reflect a “prep list,” a list of “next steps and
 3 questions due to Covid,” and a “census timeline update.” The privilege log states that each
 4 relates to pre-decisional deliberations, but provides no details or explanation as to the agency
 5 decision at issue, why the document is deliberative, or why any factual material in the document
 6 is not severable.

7 Finally, Defendants do not even attempt to explain why the privilege should not be
 8 overcome. *See FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Nor do
 9 Defendants even attempt to point to other comparable evidence, especially from the Department
 10 of Commerce. *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal.
 11 2003) (availability of comparable evidence from sources other than the government is “perhaps
 12 the most important factor in determining whether the deliberative process privilege should be
 13 overcome”). Any assertion of privilege is outweighed by Plaintiffs’ need for this information,
 14 which very well may demonstrate the arbitrariness of the Secretary’s decision.

15 Second, Defendants redact eleven documents on the basis of attorney client privilege. As
 16 this Court has held, “‘The privilege protects only those disclosures necessary to obtain informed
 17 legal advice which might not have been made absent the privilege’” and “‘does not exempt a
 18 document from disclosure simply because the communication involves the government’s
 19 counsel.’” First Order at 4 (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 584 F. Supp. 2d
 20 65, 79 (D.D.C. 2008)). Yet numerous entries on the privilege log do not describe the nature of
 21 the documents or the context necessary to assess whether legal advice was communicated. For
 22 example, the log describes DOC_0015469 as an email that contains a “communication between
 23 Commerce counsel (Jennifer Lucas) and OMB counsel,” but the mere fact that an attorney is on
 24 email does not render its contents privileged. Similarly edits to draft testimony are not privileged
 25 simply because they were made by an attorney. *See, e.g.*, DOC_0015472, DOC_0015483.
 26 Defendants have not satisfied their burden to properly assert the attorney-client privilege. *See,*
 27 *e.g., Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 350641, at *3 (N.D. Cal. Feb. 2, 2008).

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Dated: October 5, 2020

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10 **ATTESTATION**

11 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
12 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
13 in this filing.

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